No. 09-1514

In The
Supreme Court of the United States

BETTY LYN II, Motor Yacht, Official No. 55036, in rem, and BLYN II HOLDING, LLC, a Texas Limited Liability Company, in personam,

Petitioner,

vs.

CRIMSON YACHTS, an unincorporated division of Horizon Shipbuilding, Inc., an Alabama Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's careful analysis of the controlling law in its opinion reversing the District Court does not conflict with a decision of this Court, or a court of appeals, and where Petitioner does not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. The Eleventh Circuit Court of Appeals reversed a ruling of the United States District Court for the Southern District of Alabama which held that a yacht undergoing major repairs at a shipyard was not a vessel subject to the admiralty jurisdiction of the Court and that, therefore, the shipyard was not entitled to assert a maritime lien. Accordingly, the question presented is whether a watercraft which is used or capable of being used as a means of transportation on water loses its status as a "vessel" under 1 U.S.C. § 3 upon commencement of major repairs at a shipyard.

PARTIES TO THE PROCEEDING

Petitioner's recitation with respect to the parties to the proceeding is correct.

RULE 29.6 DISCLOSURE STATEMENT

Horizon Shipbuilding, Inc., an Alabama corporation, which operates an unincorporated division known as Crimson Yachts, has no parent corporation and is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the corporate stock of Horizon Shipbuilding, Inc.

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INTRODUCTORY STATEMENT

The Eleventh Circuit Court of Appeals was correct in determining that the BETTY LYN II was a vessel subject to admiralty jurisdiction and the maritime lien for necessaries, 46 U.S.C. § 31342(a)(2), and the opinion is straightforward, logical and does nothing to confuse or create inconsistency in the law as Petitioner asserts. The word "vessel" is defined in 1 U.S.C. § 3 as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." This Court held in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005) that this definition is a codification of the general maritime law and provides the correct definition of "vessel" throughout the United States Code, unless the context indicates otherwise. 543 U.S. at 489-90.

Stewart further held that "[s]ection 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel," 543 U.S. at 495, and that the focus of inquiry is the craft's capability, not its present use or station, 543 U.S. at 497. *Stewart* further noted that "a ship being lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail," and held that "[t]he question remains in all cases whether the watercraft's use as a means of transportation on water is a

practical possibility or merely a theoretical one." 543 U.S. at 496.

Despite *Stewart's* instruction that the words of the statute must be given their "ordinary and natural" meaning and its acknowledgment that this definition "sweeps broadly," 543 U.S. at 494, Petitioner would have this Court severely restrict the broad statutory definition of 1 U.S.C. § 3 by engrafting an "in navigation" requirement to it in maritime lien cases.

REASONS FOR DENYING THE PETITION

Petitioner suggests three reasons why this Court should grant the writ, but none of them are supported by the applicable law and none are persuasive.

1. *STEWART* IS A CLEAR ENUNCIATION OF THE LAW AND ITS CITATION TO *CHANDRIS* DOES NOT ENGRAFT "IN NAVIGATION" AS AN INDISPENSABLE REQUIREMENT OF THE DEFINITION OF THE WORD "VESSEL"

The first reason advanced by Petitioner is that, by the citation to *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) in *Stewart*, an indispensible "in navigation" requirement must be read into the statutory definition. Being unable to point to any clear mandate in the language of the opinion, Petitioner finds it necessary to dilute this argument with the assertion

that *Stewart* represents a "subtle change" in the law. (Petition, p. 13.)

Stewart did not change the law, subtle or otherwise. The appeal in *Stewart* was from the First Circuit, which erroneously held that a dredge was not a vessel because its primary purpose was not navigation or commerce and because it was not in actual transit at the time of the plaintiff's injury. 543 U.S. at 495. This Court said:

> Neither prong of the Court of Appeals test is consistent with the text of § 3 or the established meaning of the term "vessel" in general maritime law.
>
> Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose.

543 U.S. at 495 (italics by the Court) (internal citations omitted).

> Further explaining the First Circuit's error, *Stewart* stated:
>
> Granted, the Court has sometimes spoken of the requirement that a vessel be "in navigation," *id.*, *at* 373-374, 115 S.Ct. 2172, but never to indicate that a structure's locomotion at any given moment mattered. Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended

> periods of time. *Ibid.*; *Roper v. United States*, 368 U.S. 20, 21, 23, 82 S.Ct. 5, 7 L.Ed.2d 1 (1961); *West v. United States*, 361 U.S. 118, 122, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959)

543 U.S. 481, 496. *Stewart* then stated:

> [T]he "in navigation" requirement is an *element* of the vessel status of a watercraft. It is *relevant* to whether the craft is "used, or capable of being used" for maritime transportation. A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. *The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one.*

Id. (italics added).

Chandris was a personal injury case under the Jones Act, and it discusses the employment-related connection a worker must have to a vessel in order to qualify as a seaman under the Jones Act. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 349-50 (1995). After a lengthy discussion about seaman status, this Court said, "The foregoing discussion establishes that, to qualify as a seaman under the Jones Act, a maritime employee must have a substantial employment-related connection to a vessel *in navigation*." 515 U.S. 347, 373 (underlining added, italics in original)

To the extent that the Court or Petitioner desires a uniform definition of "vessel" to apply throughout general maritime law, that definition is espoused in 1 U.S.C. § 3 and it applies to every aspect of the U.S. Code, unless the context dictates otherwise as stated in *Stewart* and noted above. 543 U.S. at 489-490. The citation to *Chandris*, in short, has nothing to do with any intention to fashion a uniform definition of the term vessel that applies to all areas of maritime law. Indeed, *Chandris* only addressed one area of maritime law –

> This case asks us to clarify what "employment-related connection to a vessel in navigation," *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355, 111 S.Ct. 807, 817, 112 L.Ed.2d 866 (1991), is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C.App. § 688(a). In *Wilander*, we addressed the *type* of activities that a seaman must perform and held that, under the Jones Act, a seaman's job need not be limited to transportation-related functions that directly aid in the vessel's navigation. We now determine what *relationship* a worker must have to the vessel, regardless of the specific tasks the worker undertakes, in order to obtain seaman status.

Chandris, Inc. v. Latsis, 515 U.S. 347, 350 (1995).

Moreover, *Chandris* at 374, cites a legal journal's collection of cases, Bull, 6 U.S.F. Mar. L.J., at

582-584, for its proposition that extensive repairs may take a vessel out of navigation. Not surprisingly, all of those cases, save one – *New England Fish Co. v. Barge or Vessel Sonya*, 332 F. Supp. 463 (D.C. Alaska 1971), are personal injury cases which undergo the same evaluation of "in navigation" status for the same reasons – namely to determine the duty owed and the remedy available in a personal injury case.

In *New England Fish Co.*, a preferred ship mortgage was foreclosed and the vessel sold to satisfy the mortgage. 332 F. Supp. at 464. Certain parties intervened to make claims upon the proceeds, including crew members of the vessel who made a claim for unpaid wages. The court borrowed the definition of seaman from Jones Act cases and then held that the wages in question were not the wages of a crew of a vessel, as would be necessary to prime a preferred ship mortgage, because the vessel was not in navigation at the time of her arrest (she was being used to store fish and her owners had no intention of returning her to service) and the supposed crew were not doing work which required the skill of seaman. *Id. at* 467-469. Among the other intervenors mentioned in the decision were Kodiak Oil Sales, Inc. and Nakat Packing Corporation, who asserted a lien for fuel furnished to the vessel. Although the decision never mentions what happened to these claims, other than an acknowledgment that the court had admiralty jurisdiction to hear claims for maritime liens, it did speak to the issue of maritime liens for necessaries, albeit under the older code sections then in

effect before the re-organization that took place in 1975:

> "Vessel" is also defined in 1 U.S.C.A. § 3: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." This broader definition of vessel is generally applied to statutory liens for supplies and repairs under 46 U.S.C.A. § 971 (1958). *See Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955). *See generally* Annotation, What is a "Vessel" Subject to a Maritime Lien under 46 U.S.C.A. § 971, 3 A.L.R.Fed. 882. The term crew when used in conjunction with the word vessel, however, connotes a vessel still actively plying the seas. Thus, a vessel may be subject to some maritime liens but not others. For example, repairmen working aboard a vessel temporarily laid up for repairs would not be considered seamen for purposes of the Jones Act, although the policies behind 46 U.S.C.A. § 971 would still be applicable. Although this may create some anomalous situations where the ship has been more or less permanently withdrawn from navigation (*compare Pleason v. Gulfport Shipbuilding Corp.*, *supra*, which is indistinguishable from the present case, except that the liens arose under § 971). The definition of a "crewmember" as a "seaman *** on a vessel in navigation," *The Herdis*, *supra*, is well established.

332 F. Supp. 463, 467 (D.C. Alaska 1971).

Thus we see a case in the law review article referenced in the portion of *Chandris* cited by *Stewart* (all cited by the Petitioner herein), which clearly states, just as the Eleventh Circuit held in this matter, that 1 U.S.C. § 3 provides the definition of a vessel in connection with a maritime lien for necessaries. This serves to underscore that the only confusion resides in the mind of Petitioner, as opposed to a conflict among the circuits, or a conflict between the Eleventh Circuit and this Court, or general confusion among the entities engaging in maritime commerce.

The Eleventh Circuit did not ignore *Stewart* or its statement that whether a vessel is "in navigation" is relevant to a determination of its practical ability to navigate. Rather it correctly explained why this relevant factor does not completely and solely control the issue at hand – whether the BETTY LYN II was a vessel subject to a maritime lien and the district court's admiralty jurisdiction:

> The district court relied on *Stewart* for the proposition that a watercraft taken out of navigation is no longer a vessel. *Stewart* does mention that a ship's navigational status is "relevant" to whether it is practically capable of transportation on water. 543 U.S. at 496, 125 S.Ct. at 1128. The Court does not, however, *require* that a ship be "in navigation" to

> be considered a "vessel" for purposes of 1 U.S.C. § 3.[FN6]
>
> FN6. Benedict on Admiralty succinctly states the conclusion compelled by precedent and a review of the intent behind the maritime lien system: "[T]here is no reason why a vessel which has been withdrawn from navigation but which is still technically capable of being used in navigation should escape the provisions of the [Federal Maritime Lien Act]". 2 Benedict on Admiralty §§ 38 at 3-26 (7th ed. rev.1998).
>
> As we have discussed, *Stewart* decided whether a worker on a floating dredge was a seaman. *Stewart* did not decide whether a ship taken out of the water for extensive repairs was a vessel. *Stewart's* holding, thus, does not decide the issue before us. Rather, we must decide this case by looking at its distinct factual circumstances and their legal implications. *Nehring v. S.S. M/V Point Vail*, 901 F.2d 1044, 1050 (11th Cir.1990). *Stewart* simply reinforces our precedent, directing our focus to the BETTY LYN II's *practical capability* to serve as a means of maritime transportation.

Crimson Yachts v. BETTY LYN II Motor Yacht, 603 F.3d 864, 874-75 (11th Cir. 2010).

Before moving on to Petitioner's second stated basis for review, we must address its call for this Court to overturn *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 129

(1919). At p. 18, Petitioner asserts that the Eleventh Circuit "relied heavily" on *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 129 (1919). The Eleventh Circuit stated,

> Nor does the fact that the BETTY LYN II was drydocked for the repairs divest her of vessel status. *See N. Pac. S.S. Co.*, 249 U.S. at 128, 39 S.Ct. at 224 (holding that admiralty jurisdiction extended to an action for ship repairs performed in drydock, because "there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.").

Crimson Yachts v. BETTY LYN II Motor Yacht, 603 F.3d 864, 875 (11th Cir. 2010). This reference could hardly be characterized as heavy reliance. Further, the use of a drydock has never been seriously argued by any party or judge in this matter as controlling the status of the BETTY LYN II as a vessel. Petitioner then states that *North Pac. S.S. Co.* is chiefly distinguishable because this "1919 direct appeal arose out of the furnishing of services and necessaries to a vessel." Horizon asserts that the case at bar, too, arose out of the furnishing of services and necessaries to a vessel. Indeed, Petitioner wants the Eleventh Circuit's decision reviewed in hopes that the BETTY

LYN II will somehow lose its vessel status. *North Pac. S.S. Co.* did nothing more than repeat a long standing view in maritime law – contracts to build a vessel are not maritime in nature while contracts to repair a vessel are maritime. It does nothing to support Petitioner's argument.

II. THE SEAWORTHINESS CASES CITED BY PETTIONER ARE INAPPLICABLE BECAUSE "IN NAVIGATION" IS ESSENTIAL TO A PERSONAL INJURY CASE INVOKING THE WARRANTY OF SEAWORTHINESS

The second reason advanced by Petitioner for granting the writ is based upon three Fifth Circuit cases that allegedly support the premise that "in navigation" is an essential component of vessel status in repair situations. (Petition, pp. 19-25.)

The three Fifth Circuit cases relied upon, *Waganer*, *Erwin*, and *Hodges*,[1] are personal injury cases that involved shore based workers who were on board ship during repair operations and were alleged to be performing work traditionally done by seaman – known as *Sieracki* seaman.[2] The issue in each case involved

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[1] *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955 (5th Cir. 1973); *Erwin v. Lykes Brothers Steamship Co.*, 472 F.2d 1217 (5th Cir. 1973); and *Hodges v. S. S. Tillie Lykes*, 512 F.2d 1279 (5th Cir. 1975).

[2] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

whether or not the warranty of seaworthiness was breached, which turned on the question of whether or not the vessel was in navigation – as a vessel owner owes no duty of seaworthiness unless the vessel is in navigation.[3] Further, all three of these decisions relied primarily upon two seaworthiness opinions from this Court, notably *West v. United States*, 631 U.S. 118 (1959) and *Roper v. United States*, 368 U.S. 20 (1961). None of these five cases are controlling herein for three reasons: (i) none of them discuss admiralty jurisdiction or the definition of a vessel; (ii) none involved the maritime lien for necessaries; and (iii) all were decided prior to *Stewart* and focused primarily on whether the vessels were in navigation. Unlike the jurisdictional question of whether a watercraft is a "vessel," a question that must be answered objectively without regard to the ship's motion at any particular time or the ship's primary use or the owner's intended use, the warranty of seaworthiness is an "implied warranty that the vessel is reasonably fit for its intended purpose" at the time the person was injured. T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3.9 (3d ed. 2001). It should be noted that in each of these cases there was no holding that the court lacked jurisdiction, only that there was no warranty of seaworthiness because the vessel at issue was not in navigation and did not represent itself as

[3] "In-navigation status" is "essential" to the warranty of seaworthiness, a principle which is "self evident." *Johnson v. Oil Transport Company, Inc.*, 440 F.2d 109, 111 (5th Cir. 1971).

having operable equipment at the time of the injury. A warranty of seaworthiness is implied when a ship is being used in navigation and this warranty may not survive even a temporary withdrawal from navigation for major repairs because the withdrawal from navigation signals the termination of the implied warranty. *West v. United States*, 361 U.S. at 122.

Before moving on to Petitioner's third reason for review, an error in the Petition should be noted. At page 20, Petitioner states in footnote 14 "*See and compare Colonna's Shipyard, Inc. v. USAF General Hoyt S. Vandenberg*, 584 F. Supp. 2d 682[sic], 871-72 (E.D. Va. 2008) (recognizing that in the Eleventh Circuit, 'major repairs take a vessel out of navigation, not into it.)" Aside from the error in citation (682 should have been 862), this footnote should be disregarded because it is manifestly inaccurate. The quoted language is not found in *Colonna's Shipyard*. That quote instead comes from footnote 7 of the Order of the United States District Court for the Southern District of Alabama. (Petition, App. 38.) That order, of course was reversed by the Eleventh Circuit, thus leading Petitioner to ask this Court to review the Eleventh Circuit's decision. Notably, the Southern District did not cite any authority for the proposition in its footnote 7 and Petitioner cites no authority for the quote in its footnote 14 either, other than a case which does not contain the cited language.

III. THE DEAD SHIP DOCTRINE DOES NOT APPLY BECAUSE THE BETTY LYN II'S USE AS A MEANS OF TRANSPORTATION ON WATER EXISTED WHEN IT ARRIVED AT THE SHIPYARD AND THE ONSET OF REPAIRS TO IMPROVE ITS CONDITION DID NOTHING TO TRANSFORM IT INTO A DEAD SHIP

The third reason advanced by Petitioner for granting the writ is an alternative one – that even if the BETTY LYN II was a "vessel" within the statutory definition of the term, it became a "dead ship" removed from navigation. (Petition, 25.) If the dead ship doctrine still exists, it may only exist within the framework of the statutory definition – as the "question remains in all cases whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one." *Stewart*, 543 U.S. at 496. This is obviously why neither the District Court nor the Eleventh Circuit relied upon the dead ship doctrine and casts doubt upon the need to review the Eleventh Circuit's ruling. Where is the asserted error justifying review? Not only that, we are unaware of any dead ship case where a vessel was towed to a shipyard to be improved and then made a dead ship at some point during the repair process. Petitioner has certainly not cited this Court to any such case. Illogic is created when one considers that a ship which was undeniably a vessel when it arrived at a shipyard could thereafter become a dead ship and lose its practical capability of being used as a means of transportation

on water, simply because the shipyard is instructed to transform the vessel into a luxury charter yacht.

The first case cited by Petitioner in support of the "dead ship" doctrine is *Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985). (Petition, pp. 25-26.) While *Amoco Oil* does state "A 'vessel' is subject to a maritime lien. A 'dead ship' is not," the court further clarified that "[t]here is no statutory definition of a dead ship," and made clear that it was "not attempting to set out a definition of a dead ship which would fit every occasion." *Id. at* 477. Rather the court simply held "that the Barge OCEAN STATES was a vessel and subject to a maritime lien under the facts in this case." *Id. at* 477-78. Interestingly, the *Amoco* Court relied upon *Hercules Co. Inc. v. The Brigadier General Absolom Baird,* 214 F.2d 66, 69 (3rd Cir. 1954), where "the Third Circuit drew a distinction between a 'dead ship' and a 'vessel' stating that where a ship was not properly documented and was not able to sail, but efforts of everyone concerned were bent on readying her for a sealing voyage, the ship was not a 'dead ship, that is, a ship withdrawn from navigation and marine commerce, but was a vessel' subject to admiralty jurisdiction in libel *in rem* to assert a maritime lien for repairs." *Amoco Oil v. M/V Montclair*, 766 F.2d 473, 477 (11th Cir. 1985) *citing Hercules Co. Inc.* Although, the BETTY LYN II was by no means dead when she arrived at the shipyard, the efforts of everyone concerned with the BETTY LYN II were to refurbish her to luxury yacht

status and thus prepare her service as a charter yacht.

Although discussed with respect to Petitioner's second reason, Petitioner also cites to *Roper v. United States*, 368 U.S. 20 (1961). (Petition, p. 25.) *Roper* concerned a liberty ship that was deactivated and mothballed in 1945. *Id. at* 21. "[H]er supplies, stores, nautical instruments, cargo gear and tackle were removed; her pipes and machinery were drained and prepared for storage; and her rudder, tail shaft and propeller were secured," and as a result of this work, "the ship lost her Coast Guard safety certification as well as her license to operate, both of which were requisite to a vessel in navigation." *Id.* In 1956, the U.S. government decided to use the ship to store grain, but it was "not reactivated for navigation nor used for transportation purposes, but was utilized solely as [a granary] for the storage of the Government's grain. In 1956, while grain was being unloaded from the ship, a longshoreman was injured and he filed suit based on unseaworthiness. The trial court dismissed the unseaworthiness claim, finding that the vessel was not in navigation, and the appellate court affirmed. This Court, noting that nothing had changed the status of the ship since it was mothballed and deactivated in 1945 (i.e., it was not converted to a self-propelled, self directed cargo ship, prepared for use as a barge or converted to any navigational use), held that it could not "say as a matter of law that the S. S. Harry Lane had been converted into a vessel in navigation, and that the

findings of the trial court were clearly erroneous." *Id. at* 23. Accordingly, this case, which does not speak to the vessel status of a watercraft against which a maritime lien for necessaries is sought, is clearly distinguishable. Moreover, the BETTY LYN II was never mothballed or de-activated, much less for a decade. On the contrary, it was towed to the shipyard so that it could be refurbished and made a luxury yacht. The facts in *Roper*, not to mention the law, bear no similarity to the instant matter and are inapplicable. Further, a maritime lien arises at the point repairs commence.[4] There can be little doubt that the BETTY LYN II was a vessel, as opposed to a "dead ship" and thus subject to a maritime lien, at the time the maritime lien for necessaries arose. As noted by the District court herein, "the Betty Lyn was towed to the shipyard and thus was in navigation at that point." (Petition, p. 38.)

Petitioner next cites to *Delome v. Union Barge Line Co.*, 444 F.2d 225 (5th Cir. 1971), (Petitioner's Brief, p. 25), which concerned a shipfitter's suit for unseaworthiness arising out of an injury that occurred while a barge was hauled up on a marine railway. *Id. at* 226. Although, the Court held that the repairs were minor, it nevertheless denied the shipfitter's claim, because his work was not work that

[4] "[T]he federal courts have consistently held that a maritime lien arises when the necessary is *provided* to the vessel." *Dresdner Bank AG v. M/V OLYMPIA VOYAGER*, 465 F.3d 1267, 1276 (11th Cir. 2006) (citations omitted).

a seaman would do. *Id. at* 232-233. This decision did nothing more than cite to a line of seaworthiness cases, in which the duty of seaworthiness was held to not be owed in the context of repairs. *Id. at* 232. Such rulings make sense. How can a ship owner owe a duty of seaworthiness to someone who is working to make the ship seaworthy? *See, e.g., West v. United States*, 361 U.S. 118, 122 (1959). (When a vessel has been taken to a repair contractor "for the sole purpose of making her seaworthy, [i]t would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case.") Again, Petitioner cites to a seaworthiness case which is wholly unrelated to the maritime lien for necessaries. *Delome* is thus distinguishable and inapplicable to this matter.

Petitioner next cites to *Robert E. Blake Inc. v. Excel Environmental*, 104 F.3d 1158 (9th Cir. 1997). *Blake* arose out of an injury claim filed by one Pollock against Robert E. Blake, Inc. ("Blake"). Blake had been hired by the U.S. Government in the fall of 1990 to repair and re-activate the S.S. CAPE BOVER, which had been out of service and in the ready reserve fleet for several years. Blake sub-contracted some of the work to Excel and on December 8, 1990 the ship engaged in successful sea trials. Pollock, Excel's employee, was injured on December 15, 1990 and filed suit thereafter. The opinion concerns Blake's efforts to seek indemnification from Excel pursuant to an unsigned purchase order which Blake issued to

Excel (prior to Excel's performance) for the damages claimed by Pollock.

The Court held that because the CAPE BOVER was a dead ship at the time the contract was formed ("Because the *Cape Bover* had been stored for "several years" and had been deactivated, the vessel was withdrawn from navigation and thus admiralty jurisdiction as well." *Id. at* 1160), California law governed the contract, rather than admiralty law, and Blake's third party claim for indemnity was thus barred. When Blake argued about the seeming inconsistency of allowing Pollock to recover in admiralty while Blake was denied admiralty jurisdiction, the Court noted that, "The contract was formed before the *Cape Bover* was reactivated while the injury occurred after the vessel successfully completed sea trials." *Id. at* 1163. Again, this case does not involve a maritime lien for necessaries, nor does it involve an arrest. Rather the case simply states that in the Ninth Circuit a contract to reactivate a dead ship is not maritime in nature. In this matter, as noted above, no one has claimed or could reasonably claim that the BETTY LYN II was a dead ship at the time Horizon began to work on it. It had not been out of service for several years when Horizon began work on it and it was not part of a reserve fleet. For these reasons, Blake is thus distinguishable and does not control or even provide by analogy, the correct rule of law.

Petitioner's citation to "dead ship" cases highlights its miscomprehension of the maritime lien for necessaries. The lien arises at the time necessaries are provided, i.e., when work begins on the vessel. Petitioner has not argued any facts which would tend to show that the BETTY LYN II had been mothballed, withdrawn from service, laid up, or stored for a period of several years before Horizon began to work on the vessel. The vessel was towed to the shipyard. It was a vessel when it arrived and there is simply no way, under logic, reason, or law it could have ceased to be a vessel, while or because the shipyard worked to refurbish it to be a luxury charter yacht. As noted by the Eleventh Circuit – "Congress could not have intended as the need for protection increased, the law's protection would retract. Thus, the maritime – lien system surely applies in scenarios such as this." *Crimson Yachts v. BETTY LYN II Motor Yacht*, 603 F.3d 864, 876 (11th Cir. 2010).

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals is well reasoned and correct. Petitioner has not established any compelling reason for this Court

to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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